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IN THE

Supreme Court of the United States

OCTOBER TERM—1956

No. ~~729~~ 72

STANISLAW NOWAK,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	5
The Pleadings	6
The Evidence	9
The Opinions Below	16
Reasons for Granting the Writ	17
I. The Affidavit of Good Cause Does Not Satisfy the Requirements Set Forth in *U. S. v. Zucca*, 351 U. S. 91	19
II. The Evidence Fails to Establish That Petitioner's Naturalization Was Falsely or Illegally Obtained	25
III. The Naturalization Court's Finding of Good Moral Character and Attachment Cannot Be Re-examined in the Absence of Fraud	42
IV. The Order of Denaturalization Violates the First and Fifth Amendments	46
Conclusion	49
Appendix:	
New York Times Index 1934-1938	1a
Opinion of the Court of Appeals	4a

TABLE OF AUTHORITIES

Cases

	Page
American Communications Assn. v. Douds, 339 U. S. 382	18, 48
Baumgartner v. United States, 322 U. S. 665	18
Bridges v. California, 314 U. S. 190, 252	47, 49
Carlson v. Landon, 342 U. S. 524	18
Commissioner v. Sunnen, 333 U. S. 591, 596-598	46
DeJonge v. Oregon, 299 U. S. 355, 363-6	48
Dennis v. United States, 341 U. S. 492, 494	17, 18, 48, 49
Ex parte Morgan, 20 Fed. 298	24
Gitlow v. New York, 268 U. S. 652	27
Harisiades v. Shaughnessy, 342 U. S. 580	18
Herndon v. Mallory, 301 U. S. 242, 261	48
Klapprott v. United States, 335 U. S. 601, 610	23
Knauer v. United States, 328 U. S. 654	17, 18, 44, 45
Musser v. Utah, 333 U. S. 98	49
Nathanson v. United States, 290 U. S. 41	24
Near v. Minnesota, 283 U. S. 697, 716	48
O'Connor v. United States, unreported, 25 Law Week 2273, December 20, 1956	32
People v. Gitlow, 234 N. Y. 132	27
People v. McLaughlin, 243 N. Y. 147, 153 N. E. 853	24
Rafferty ex rel. Huie Fong v. Bligh, 55 F. 2d 189, 194	24
Reeve v. Howe, 33 F. 2d 619	24
Riley v. Colpsys, 85 F. 2d 282	24
Schneiderman v. United States, 320 U. S. 118	17, 26, 27, 29, 30, 31, 41, 44
Sealfon v. United States, 332 U. S. 575	46
Simmons v. United States, 18 F. 2d 85	24

	Page
So. Pac. Co. v. United States, 168 U. S. 1, 48-49	46
Stromberg v. California, 283 U. S. 359	47
Sutherland v. United States, 92 F. 2d 305	24
Sweet, Chomiak and Charnowola cases, 211 F. 2d 118 (1954); cert. den. 348 U. S. 817	41
Terminello v. City of Chicago, 337 U. S. 1, 4	48
United States ex rel. McCline v. Meyering, 72 F. 2d 716	24
United States v. Baumert, 179 Fed. 735	24
United States v. Chandler, unreported, D. Me., No. 7447, Civil, June 27, 1956	19
United States v. Costello, unreported, S. D. N. Y. No. 70-309, May 21, 1956	19
United States v. Ginsberg, 243 U. S. 472	17
United States v. Hall, 114 Fed. Sup. 441	24
United States v. Kaplan, unreported, U. S. D. C. Conn., 3509 Civil, May 4, 1956	19
United States v. Kennedy, 5 F. R. D. 310	24
United States v. Kessler, 213 F. 2d 53 (1954)	32
United States v. Langsdale, 115 F. Supp. 489	24
United States v. McCunn, 40 F. 2d 295	24
United States v. Office Number 508 Ricond-Brewster Building, 119 F. 2d 24	24
United States v. Oppenheimer, 242 U. S. 85	46
United States v. Reynolds, 111 F. 2d 589	24
United States v. Rovin (E. D. Mich.), 12 F. 2d 942	39-40
United States v. Zucca, 351 U. S. 91	2, 17, 19-23
Weiman v. Updegraff, 344 U. S. 183	33

Statutes

	Page
Nationality Act of 1906, Secs. 4, 7, 15	3-4, 5, 16, 18, 25, 26, 46
Nationality Act of 1940 (8 U. S. C. 907, etc., 54 Stat. 1137)	4, 5, 8, 26
8 U. S. C. 364	3
8 U. S. C. 382	3
8 U. S. C. 405	4
8 U. S. C. 707	4
8 U. S. C. 738(a)	5, 9
8 U. S. C. 907	4
28 U. S. C. 1254	2

Miscellaneous

Encyclopedia Brittanica, 12th ed., 1926, Vol. 1, p. 692	27
Harvard Law Review, Vol. 66, pp. 643, 719	44
Internal Security Act of 1950, 64 Stat. 1015	26
Michigan Law Review, Vol. 51, pp. 881, 892	44
New York Times Index	32

IN THE

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OCTOBER TERM—1956

No.....

STANISLAW NOWAK,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays for a Writ of Certiorari to review a final judgment of the United States Court of Appeals for the Sixth Circuit affirming the judgment of the United States District Court for the Eastern District of Michigan, Southern Division revoking and cancelling Petitioner's Certificate of Naturalization.

OPINION BELOW

A single opinion was rendered on November 26, 1956 by the Court of Appeals in this case and the case of *Maisenberg v. United States* (in which Petition for Certiorari also is being filed). The opinion does not appear to have been reported. A copy is included in the Appendix to this Petition (*infra* p. 4a).

The opinion of the District Court is unreported but is included in the Appendix to Appellant's Brief in the Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals was rendered on November 26, 1956. The jurisdiction of the Supreme Court of the United States is invoked pursuant to the provisions of 28 U. S. C. Sec. 1254.

QUESTIONS PRESENTED

1. Does the "Affidavit of Good Cause" filed with the Complaint herein satisfy the requirements set forth by this Court in its opinion in *U. S. v. Zucca*, 351 U. S. 91?

2. Does the evidence establish the charge that Petitioner's naturalization was illegally or fraudulently obtained?

3. Is the Naturalization Court's Finding of Good Moral Character and Attachment subject to re-examination?

4. Was Petitioner deprived of his citizenship in violation of rights guaranteed him under the First and Fifth Amendments to the Federal Constitution?

STATUTES INVOLVED

At the time of Petitioner's naturalization in 1938 the Nationality Act of 1906, as amended (34 Stat. 596), was in effect.

Section 4, subsection (4) provided:

> "It shall be made to appear to the satisfaction of the Court admitting any alien to citizenship that * * * he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, and the name, place of residence, and occupation of each witness shall be set forth in the record." (34 Stat. 598, 8 U. S. C. 382.)

Section 7, provided:

> "That no person who disbelieves in or who is opposed to organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the government of the United States, or of any other organized government, because of his or their official character, or who is a polygamist shall be naturalized or be made a citizen of the United States." (34 Stat. 598; 8 U. S. C. 364.)

And *Section 15* provided that:

> "It shall be the duty of the United States district attorneys for the respective districts or the Commissioner or Deputy Commissioner of Immigration and Naturalization upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured." (8 U. S. C. 405, 34 Stat. 601.)

Subsequent to Petitioner's naturalization, the foregoing Sections of the 1906 Act, as amended, were repealed by the Nationality Act of 1940 (8 U. S. C. 907, etc. 54 Stat. 1137). The 1940 Act changed the above-quoted language of the behavior requirement of Section 4 of the 1906 Act so as to require a showing that the applicant "has been and still is a person of good moral character, attached to the principles of the Constitution of the United States * * *" (54 Stat. 1142; 8 U. S. C. 707).

It also expanded the belief requirements of the former law so as to preclude naturalization of any person:

(a) Who advises, advocates, or teaches, or who is a member of or affiliated with any organization, association, society, or group that advises, advocates, or teaches opposition to all organized government;

or

(b) Who believes in, advises, advocates, or teaches, or who is a member of or affiliated with any organization, association, society, or group that believes in, advises, advocates or teaches—

(1) the overthrow by force or violence of the government of the United States or of all forms of law;"

In addition, the 1940 Act also reenacted substantially the above-quoted Section 15 of the 1906 Act, as amended, authorizing cancellation of any naturalization certificate upon the grounds of fraud or illegal procurement. (54 Stat. 1158, 8 U. S. C. 738(a)). Subsection (g) of this section made this cancellation provision applicable "to any naturalization heretofore granted by any court."

STATEMENT

The present proceeding is pursuant to the cancellation provision of the 1940 Act.

Petitioner is a former Michigan State Senator. He was born in Poland in 1903. At the age of ten he came to the United States with his father and located in Chicago where he completed his highschool education.

At the age of 16 he began work as a newspaper reporter, and in 1924 he came to Detroit where for three years he edited a weekly labor newspaper in the Polish language.

In 1927 he returned to Chicago, and became active in the Amalgamated Clothing Workers Union of America.

He returned to Detroit in 1932, obtained employment as an autoworker, married a native American and has resided with his wife and their daughter in Detroit ever since.

In 1936 Petitioner became an organizer for the United Automobile Workers Union; and on June 13, 1938 he became a naturalized American citizen by order of the United States District Court at Detroit.

In November, 1938, five months after his naturalization, Petitioner was elected to the Michigan State Senate on the Democratic ticket. (Michigan Official Directory and Legislative Manual for 1941 (p. 667).) He was reelected each two-year period until 1948. Petitioner has no criminal record.

At the November Term, 1942 of the Federal Grand Jury at Detroit, he was indicted upon an indictment alleging the same charge (i.e., swearing falsely in his naturalization proceeding) as that set forth in the present proceeding. Subsequently, and on February 8, 1943, and on motion of "the Attorney General of the United States," an order of *nolle prosequi* was entered upon that indictment. (Docket No. 26899, U. S. D. C., E. D. Mich., S. D., Moinet, D. J.)

The present denaturalization proceeding against Petitioner was instituted on December 23, 1952.

The Pleadings.

The Complaint, as amended (App. 2a),[1] alleges that the Petitioner made four false representations in the course of his naturalization proceeding:

First: That in the oral examination on his Petition for Naturalization, Petitioner was asked and falsely denied membership in the Communist Party.

Second: That Petitioner answered falsely to the following questions in his Preliminary Form of Petition (see App. 19a):

"(23) Do you fully believe in the form of government of the United States? *Yes.*"

"(28) Are you a believer in anarchy? *No.* Do you belong to or are you associated with any organization which teaches or advocates anarchy or the

[1] "App. 2a" refers to the printed Appendix filed with the Appellant's Brief in the Court of Appeals.

overthrow of existing government in this country? *No.*"

Third: That the following statement in his Petition for Naturalization was false (See App. 22a):

"(7) I am not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government; I am not a polygamist nor a believer in the practice of polygamy. I am attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States. It is my intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty * * *."

Fourth: That the following oath taken by Petitioner in open Court was false:

"That he would support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that he would bear true faith and allegiance to the same; and that he took this obligation without any mental reservation or purpose of evasion."

The Complaint further charged that Petitioner lacked the requisite "good moral character" and was not attached to the principles of the Constitution at the time of his naturalization. Cancellation of his naturalization was requested upon both of the statutory grounds—fraud and illegal procurement.

Attached to and made a part of the Complaint is the affidavit of one Reuben Speiser, an attorney for the Immigration and Naturalization Service, United States Department of Justice. The affidavit states that affiant "has ac-

cess to the official records of the said Service from which the following facts appear:" The affidavit then sets forth the date and place of Petitioner's naturalization, the foregoing answers given by Petitioner in the course of his naturalization, and charges that such answers were false (App. 8a).

The affidavit further charges that Petitioner was "an active member of the Communist Party of the United States from about 1935 until the date of his naturalization and has continued such membership until the present time" (App. 9a).

The affiant then avers (in the statutory language of the Nationality Act of 1940, notwithstanding Petitioner was naturalized in 1938) that Petitioner and the Communist Party, "at all times mentioned herein," engaged in conduct allegedly proscribed by the 1940 Act; "that the Communist Party of the United States was a section of an international organization whose principal officers were citizens" of the Soviet Union and "that decisions made by such organization were binding upon * * * the Communist Party of the United States and the members thereof * * *." (App. 10a); that Petitioner "at all times since 1935" bore allegiance to the Soviet Union, and that he "intentionally and deliberately made false statements" in his naturalization proceeding "in order to prevent * * * a proper investigation of his qualifications for citizenship;" and "to conceal his lack of attachment * * * and to procure naturalization in violation of law."

The affidavit then sets forth (App. 11a) the conclusion that Petitioner's naturalization "was illegally and fraudulently procured;" that Petitioner lacked good moral character and attachment by reason of his alleged Communist Party membership and the allegedly false answers given in his naturalization papers; and "that good cause exists

for the institution" of a denaturalization proceeding against Petitioner.

Petitioner's Answer (App. 15a) admitted the execution and filing of the above mentioned naturalization forms, the taking of the oath, and the grant of naturalization. It denied that the answers given or the oath taken were false; and it denied the allegation of Communist Party membership.

The Answer also challenged the sufficiency of the *Speiser* affidavit, alleging that the same is "based upon hearsay," sets forth "conclusions" and "is not in the form required by law."

Additionally, the Answer alleged the following as special defenses and moved for dismissal of the Complaint:

> (a) That the institution of this proceeding ten years after the dismissal of an indictment based upon identical charges constitutes an abuse of the process of the Court and a denial of due process.
>
> (b) That Section 338(a) (8 U. S. C. Sec. 738(a)) of the Nationality Act of 1940 [under which the suit is brought] on its face, and as applied to Petitioner, is unconstitutional under the First and Fifth Amendments to the Federal Constitution.
>
> (c) That the judgment of naturalization is *res judicata* as to all issues determined thereby.

The Evidence

The Government called twelve (12) witnesses, two of whom were naturalization examiners. Both examiners were extremely positive in their recollection that at the time of his naturalization interview in 1938, Petitioner was asked by them and gave a negative answer to the question: "Have you ever been a member of the Communist Party?"

Examiner Hart said that he was aware of speeches and other union activity by Petitioner in connection with the 1936 sit-down strikes in the automobile industry (Trial Tr. p. 77); that he was of the opinion that these sit-down strikes represented Communist Party attempts "to gain their first foothold in this country" (Trial Tr., p. 87); and that he "felt because Mr. Nowak had participated in such a strike that that in [Hart's] mind was a link between [Nowak] and the Communist Party."[2]

Examiner Smiley testified that on the morning of the day Petitioner was to appear for questioning, he (Smiley) was asked by someone: "Did you know Mr. Nowak is in this morning?" "Did you know he is a Communist?" (Trial Tr. 133). Also, that Petitioner's name had frequently appeared in the public press in connection with labor activity.

The Trial Court, however, expressly declined (App. 26a-27a) to find that Petitioner had been asked by either examiner whether or not he was or had been a Communist Party member. He found no reference in their notes that such an inquiry was made (App. 26a-27a).

The testimony of one other Government witness, Thaddeous Zygmont, also was discredited by the Trial Court and "completely ignored" (App. 28a), notwithstanding that, on cross-examination, this witness' testimony (See *infra*, p. 34) tended to refute the contention that the Communist Party, in the period in question here, advocated the violent overthrow of the government.

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[2] Cf. Examiner's notations on Petitioner's Petition for Naturalization (App., 2.23a, lower right corner) which indicate a thorough examination of Petitioner's labor activity.

The testimony of the nine (9) other witnesses called by the Government is thus summarized by the Government in its Brief (p. 5) filed in the Court of Appeals[3]

> "To prove the appellant's membership in, knowledge of, and activities in the Communist Party, the Government introduced nine witnesses. One additional witness, Baxter, testified as to the aims and objectives of the Communist Party after being qualified as an expert witness in regards to those aims and objectives. In addition to the oral testimony of the witnesses, the Government introduced fourteen books and pamphlets which were literature used and distributed by the Communist Party during the period of appellant's membership therein.[1]"

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[1] (a) "The Communist Manifesto", by Carl [sic] Marx and Frederick Ingals [sic], by International Publishers, Inc.;

(b) "State and Revolution", by V. I. Lenin, copyrighted 1932 by International Publishers, Inc.;

(c) "Left Wing Communism and Infantile Disorder" [sic], by V. I. Lenin, copyrighted by International Publishers, New York, 1940;

(d) "Program of the Communist Internationale", copyrighted by Workers Library Publishers in 1929, third edition printed in February, 1936;

(e) "Foundations of Leninism", by Joseph Stalin, copyrighted in 1939 by International Publishers, Inc.;

(f) "The Communist Party. A Manual on Organization", by J. Peters, published in 1935 by the Workers Library Publishers;

(g) "The Struggle Against Imperialist War and the Tasks of the Communists", published by Workers Library Publishers, second edition of July, 1934;

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[3] Petitioner does not concede the correctness of this summary. It is quoted here merely as presenting the evidence in a manner which the Government obviously deemed most favorable to its contentions.

(h) "Why Communism", by M. J. Olgin, published by Workers Library Publishers, December 1933;

(i) "Why Every Worker Should Join the Communist Party", published by Workers Library Publishers, Inc., no printing date being shown;

(j) "Problems of Leninism", by Joseph Stalin, copyrighted in 1934 by International Publishers Company, Inc.;

(k) "The Ultimate Aim", copyrighted in 1935 by International Publishers Company, Inc.;

(l) "Report to the Eighth Convention Communist Party", by Earl Browder, 1934, published by Workers Library Publishers;

(m) "Resolutions of the Seventh Congress of the Communist Internationale", published in 1935, Workers Library Publishers;

(n) "The Twenty-One Conditions of Admission into the Communist Internationale", by O. Piatnitsky, published by Workers Library Publishers.

[There was no evidence connecting Petitioner with any of these documents.]

"Witness Nowell was qualified as an expert on the aims and objectives of the Communist Party in addition to his identification of appellant as a member of the Communist Party."

"Baxter and Nowell both testified that they attended the Lenin Institute in Moscow, [in 1931] a school conducted by the Communist International of which the Communist Party of the United States was a Section, and both testified that they were taught that the ultimate aim and objective of the Communist Party of the United States is the overthrow of this Government by force or violence. They were taught that the Communist Party of the United States was bound by the decisions of the Communist International. They were taught the science of civil warfare designed to destroy our government and to establish a dictatorship for the

proletariat. They testified that they taught in Communist Party schools and at Communist Party meetings that the objectives of the Communist Party of the United States was the overthrow of this government by force and violence."

* * * * *

"In addition to testifying that the aims and objectives of the Communist Party of the United States were the forceful overthrow of the Government of the United States, witness Nowell testified that he had attended several closed meetings of the Communist Party from 1935 through 1936 with the appellant, in addition, he had solicited Nowak's membership in the Communist Party and was present at appellant's induction. Witness Nowell further testified that the appellant 'eventually came over wholeheartedly and became a member of the Communist Party' (T. 457) and that on the occasion of appellant's induction into the Communist Party in September 1935 that the appellant 'made a brief analysis of capitalism and the conditions under which the Communist Party operated' (Appellant's brief, p. 46), and thereafter the appellant 'pledged his allegiance to the leadership, program, policies, and premises of the Communist Party of the United States and Communist International at that meeting following his induction by William Weinstone.' "

"Witness Budenz testified that he was a member of the National Committee of the Communist Party and also editor of the Daily Worker, whose duties were to edit the paper in such a way that it would precisely give directives to the Communists throughout the country. Budenz first met the appellant in Chicago, the latter part of 1937 or 1938, at a Communist Party meeting of midwest functionaries who met in order to advance the Midwest Daily Record, which was the official Communist Party organ at that time."

"Jack Stachel, who Budenz described as 'the most important member of the Politburo' (T. 966) introduced the appellant to Budenz as 'a valuable member of the party'" (T. 967).

"Budenz further testified that he attended several enlarged National Committee meetings of the Communist Party in New York City with the appellant. The first in the latter part of 1938 or 1939 and two in the forties. Budenz also testified that he discussed the fact that appellant was running for the State Legislature at a district bureau meeting of the Communist Party in Detroit on the occasion of one of his visits in 1938 or 1939. That the discussion was as to the mobilizing of the Communist Party to support him in the elections that were to take place (T. 974). Budenz described appellant as an important functionary of the Communist Party and stated that on occasion he discussed with appellant the opportunities of the Communist Party to obtain influence as a result of the war situation" (T. 977).

"Defense Exhibit 7 'Men Without Faces' was introduced and in it Witness Budenz, the author, is quoted as saying that he ran into many surprising faces, surprising that is, in that the public would not have suspected them to be seen in such a place (Communist Party Headquarters in New York on the ninth floor).

> 'Up there too I ran into Senator Stanley Nowak of Michigan, at the time when he was denying all relationship with the Communist Party but when I knew him to be taking orders from the Party leaders '" (T. 989).

"Doctor Hewitt testified that he was a research scientist and teacher at the Des Moines Still College of Osteopathy and Surgery in Iowa, and joined the Communist Party in late 1936 in Chicago, Illinois. In September 1938, Doctor Hewitt

became an instructor in physiology at Michigan State College, located in Lansing, Michigan. He was instructed by the Communist Party to reconnect with the Communist Party in Michigan through the appellant (T. 563).

"After testifying that he had attended closed meetings of the Communist Party with the appellant and collected dues from the appellant and had paid dues to the appellant, and had worked with the appellant in establishing a Communist Party unit at Michigan State College, Doctor Hewitt further testified that

> "I was told that Stanley Nowak was, because of his position in the Michigan State Legislature, a secret Communist; and I wasn't to go running to him when I had any little problem; * * *. That we shouldn't expect him to attend meetings that we were not to get in touch with him at the Capitol in the Legislature' " (T. 575).

"A summary of the additional witnesses' testimony is found in the Opinion of the Court and will not be discussed further here (Appellant's Appendix 28a-29a)."

Counsel's reference to the Trial Court's opinion refers to the Court's following summary of the testimony of the remaining five Government witnesses:

> "Witness Fountain—Attended closed Communist Party meetings in Detroit with Nowak from June 1937 through 1938; knew Nowak to be a Communist Party member; attended Communist Party schools where Nowak lectured on 'Strategy of the Communist Party in relation to labor, and rise of Hitler.' ".
>
> "Witness Eager—Nowak solicited Eager's membership in Communist Party in 1937; knew Nowak was a Communist Party member and attended

many closed Communist Party meetings from 1937 through 1938."

"Witness Reno—Knew Nowak to be a Communist Party member from July or August 1937 to December 1938; attended functionary meetings with Nowak; closed Communist Party meetings and an enlarged National Committee meeting in December 1938 with Nowak. Also saw his Communist Party card."

"Witness Rataj—Attended one closed Communist Party meeting with Nowak in fall of 1937."

"Witness Herbster—Attended one closed Communist Party meeting with Nowak in summer of 1937."

Petitioner was not called to the stand by the Government and offered no testimony at the trial.

The Opinions Below

The Trial Court held that the validity of Petitioner's naturalization must be determined by the Nationality Act of 1906, as amended, in effect at the time of Petitioner's naturalization; that the "belief" proscriptions in that Act were directed "at polygamists and anarchists" and "that nothing contained in Section 7" of that Act "barred naturalization of one because he was a member of the Communist Party" (App. 25a). However, the Trial Court concluded that Petitioner was a member of the Communist Party at the time of his naturalization and knew that the organization advocated "the overthrow of this Government by force and violence" (App. 32a); that he intentionally concealed his Communist Party membership when he answered Question No. 28 and at the time he swore allegiance; and that this concealment, together with the

nature of the organization, marked Petitioner as a person lacking in good moral character and attachment to the Constitution (App. 32a-33a).

The order of cancellation, based upon a finding of fraud and illegal procurement, was entered on August 9, 1955.

The Court of Appeals, affirming the Trial Court, held that all of the legal issues presented (except as to the sufficiency of the affidavit of good cause) "have been adjudicated adversely" to Petitioner by the prior opinions of the Court of Appeals wherein that Court had cited the Supreme Court's holding in *Knauer v. United States*, 328 U. S. 654; *United States v. Ginsberg*, 243 U. S. 472; *Schneiderman v. United States*, 320 U. S. 118; and *Dennis v. United States*, 341 U. S. 492. It concluded that the District Court's findings "were not clearly erroneous" and that its conclusions of law were "supported by the highest authority."

The Court of Appeals also held that the affidavit of good cause here "was an adequate compliance with the statutory requirements as interpreted in the *Zucca* case" (351 U. S. 91).

REASONS FOR GRANTING THE WRIT

There is a prevailing aura of uncertainty which surrounds this Court's holding in *United States v. Zucca*, 351 U. S. 91; and there also is an increasingly prevalent notion that "recent statements by the Supreme Court clearly point out that all that is left of the *Schneiderman* case (320 U. S. 118) is the rule as to *quantum* of proof."[4]

(1) The writ should be granted here to remove these doubts; to make clear the meaning of the requirement in

[4] So stated by the Government in its Brief (p. 43, 49) below.

Zucca that there must be an affidavit setting forth "evidentiary" matter as a precondition to the institution of a denaturalization suit; and to assess and determine the true limits of the impact of this Court's several recent holdings concerning the character of the Communist Party in the post-1940 period (Cf. *Harisiades v. Shaughnessy*, 342 U. S. 580), or post-1945 period (*Dennis v. United States*, 341 U. S. 494; *Carlson v. Landon*, 342 U. S. 524 and *American Communications v. Douds*, 339 U. S. 382) with its prior holdings in *Schneiderman*, and the legal effect of these holdings upon naturalization granted in the pre-1940 period.

(2) The writ should be granted to determine, what was left undetermined in *Schneiderman*, what was distinguished by this Court in *Knauer v. United States*, 328 U. S. 654, and what was left unclear in *Baumgartner v. United States*, 322 U. S. 665, namely, the allowable extent to which findings of "good moral character" and "attachment," judicially arrived at on the basis of evidence presented to the naturalization Court in an adversary proceeding, may nevertheless be reviewed and set aside years later in a denaturalization suit such as the instant proceeding.

(3) And, finally, the writ should be granted to determine the constitutionality of the proscription (in Question 28 of the Petition for Naturalization herein) against membership in organizations which teach or advocate "the overthrow of existing government in this country," in the light of the fact that such a proscription is not expressly authorized by the 1906 Act, as amended; and, if inferred, is in conflict with this Court's decisions holding that: (a) aliens are protected by the First Amendment (b) the First Amendment will not permit proscription of advocacy of peaceful overthrow; and (c) First Amendment rights can be circumscribed only where the speech or conduct is an "incitement to action" and presents "a clear and present danger of substantive evil."

Thus, this case not only presents questions of Federal law of great legal and public importance which should be settled by this Court but the Court of Appeals has decided these important questions in a way which conflicts with constitutional principles and applicable decisions of this Court, and has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power and supervision.

I.

THE AFFIDAVIT OF GOOD CAUSE FILED WITH THE COMPLAINT HEREIN DOES NOT SATISFY THE REQUIREMENTS SET FORTH IN UNITED STATES v. ZUCCA, 351 U. S. 91

Ever since the opinion of this Court in the *Zucca* case, 351 U. S. 91, 76 S. Ct. 671, the District Courts have struggled with the question of the sufficiency of the required affidavit of good cause in denaturalization proceedings. Such questions as the following have been raised and are pending in the various District Courts. Who is competent to make such affidavit? What is the nature of the "evidentiary matters" which must be set forth in such affidavit? Is an affidavit sufficient which merely sets forth the conclusions reached by an immigration officer after his review of unidentified "official records" of the immigration service? Is the affidavit "jurisdictional" in the sense that, absent a sufficient affidavit, the District Court lacks jurisdiction to proceed with the cause? *United States v. Kaplan*, unreported, U. S. D. C. Conn., No. 3509 Civil, May 4, 1956; *United States v. Costello*, unreported, S. D. N. Y. No 70-309, May 21, 1956; *United States v. Chandler*, unreported, D. Me., No. 7447 Civil, June 27, 1956.[5]

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[5] These questions are awaiting determination in several denaturalization cases now pending in the District Court below.

Apparently, the decision in *Zucca* has left the answer to these questions in substantial doubt. The minority opinion there, however, (if its conclusion as to the import of the majority opinion is valid) appears to have resolved these doubts in favor of Petitioner's contentions here.

In *Zucca*, the majority ruled in the penultimate sentence of its opinion (76 S. Ct. 26 677):

> "We believe that, not only in some cases but in all cases, the district attorney must, as a prerequisite to the initiation of such proceedings, file an affidavit showing good cause."

Petitioner contends that this holding clearly indicates that a legally sufficient affidavit is a jurisdictional requirement.

The majority also made a distinction between the allegations to be made in the bill of complaint and the facts to be set forth in the required affidavit (76 S. Ct. 676):

> "The complaint, under modern practice, is required merely to allege utlimate facts while the affidavit must set forth evidentiary matters showing good cause for cancellation of citizenship."

Finally, the majority in *Zucca* emphasized that, notwithstanding the complaint there was verified by an Assistant United States Attorney and no part of it was alleged on information and belief, nevertheless this Assistant United States Attorney subsequently filed an affidavit stating that he had no personal knowledge of any of the facts set forth in the complaint and that his only knowledge or information was obtained by him "through files turned over to him for use in preparation of the complaint" (76 S. Ct. 673, note 4).

Petitioner contends that this reference by the majority in *Zucca* indicates that an affidavit not based upon personal knowledge is legally insufficient.

The dissent in *Zucca* interpreted the above views of the majority to mean "As petitioner contends, 'good cause' means that the government must furnish the Court with sworn statements by persons having personal knowledge of the facts;" and that, "Apparently neither the United States Attorney nor anyone in the Immigration Service or the F. B. I. can make such an affidavit unless he has personal knowledge of the facts." The dissent was of the view that:

> "At most it should be sufficient for an officer of the Immigration and Naturalization Service familiar with the case to make such allegations under oath."

In the present case it is apparent that the Court of Appeals accepted this minority view in *Zucca* and disapproved of the majority view. The Court of Appeals specifically held:

> "In our judgment, the affidavit of an attorney of the Immigration and Naturalization Service of the United States Department of Justice reciting facts appearing in the official records, such as the affidavit filed in each of these cases, was an adequate compliance with the statutory requirements as interpreted in the *Zucca* case."

This, we think, is an incorrect reading of *Zucca* for the following reasons:

First: The legal effect of the verified complaint in *Zucca* and the subsequent affidavit of the Assistant United States Attorney, places *Zucca* on "all fours" with the instant case with respect to the affidavit requirement. In each

instance the verified allegations are merely conclusions reached by the affiant from his examination of unidentified "files" or "official records" of the Service. The majority in *Zucca* held that this was not sufficient because it did not set forth "evidentiary matters showing good cause for the cancellation of citizenship." The Court of Appeals here reaches the opposite conclusion.

Second: The majority in *Zucca* makes it clear that the affidavit must be "evidentiary" in substance and not merely in form. To be "evidentiary," what is asserted must be presented by a witness who is competent and must be of a quality that would be admissible at the trial of the cause. For in *Zucca* the complaint was, so far as the form of the allegations are concerned, at least as "evidentiary" as the affidavit in this case. For example, what could be more "evidentiary" in form than paragraph 7 of the *Zucca* complaint, which alleged "that the said defendant was a member of the Communist Party of the United States * * * from 1925 to 1947?" Nevertheless, the majority in *Zucca* held this sworn allegation to be insufficient. The reason, as footnote 4 to the majority opinion makes clear, was that the assertion represented the affiant's conclusions and was not based upon his personal knowledge. As such it was hearsay—perhaps two or three times removed—and not admissible at the trial of the cause. Thus the Court of Appeals here has accepted precisely what was rejected by this Court in *Zucca*.

Third: The acceptance by the Court of Appeals of the affidavit here is contrary to the spirit and intent of the affidavit requirement as explained by the majority in *Zucca*. For in *Zucca* this Court stated (76 S. Ct. 676):

> "The mere filing of a proceeding for denaturalization results in serious consequences to a defend-

> ant. Even if his citizenship is not cancelled, his reputation is tarnished and his standing in the community damaged. Congress recognized this danger and provded that a person, once admitted to American citizenship, should not be subject to legal proceedings to defend his citizenship without a preliminary showing of good cause. Such a safeguard must not be lightly regarded."

Yet, what is it but a "light regard" for the affidavit requirement, if a hearsay-on-hearsay affidavit is accepted? And how can a summary of some unidentified file material actually show "good cause" merely because the summary is notarized? For all that appears from the affidavit here, "the official records of the Service," which the affiant purports to have consulted, may be no more than "information acquired * * * from looking at hearsay statements in a F. B. I. dossier." (*Klapprott v. U. S.* 335 U. S. 601, at 610.)

Fourth: The Government argued below that a criminal indictment may be founded upon hearsay. The dissent in *Zucca* argues the same analogy (76 S. Ct. 676). But this is true of indictments, for historical reasons, because of the public policy inherent in not exposing grand jury proceedings to public scrutiny. In denaturalization cases a different public policy (as indicated in *Zucca*) has been announced by Congress.

Fifth: The correct analogy is not to indictments; rather, it is to other situations in which an affidavit of cause is required as a prerequisite to legal action. Thus, Title 18 U. S. C., Sec. 3182, requires that before extradition may be ordered there must be presented "an affidavit made before a Magistrate of any State or Territory, charging the person demanded with having committed treason, felony or other crime." The Courts almost uniformly have

held that such an affidavit must state facts of the affiant's own knowledge which would be admissible as evidence and sufficient to warrant a finding of probable cause of commission of the offense by the accused. *Rafferty ex rel. Huie Fong v. Bligh*, 55 F. 2d 189, 194; *U. S. ex rel. McCline v. Meyering*, 72 F. 2d 716; *Ex Parte Morgan*, 20 Fed. 298; *Riley v. Colpsys*, 85 F. 2d 282; and *People v. McLaughlin*, 243 N. Y. 147, 153 N. E. 853.

Again, the Fourth Amendment to the Federal Constitution provides that "no warrants shall issue, but upon probable cause supported by oath or affirmation." Controlling judicial authority holds that the good cause affidavit for issuance of a warrant must be on personal knowledge and not on information and belief. *Sutherland v. U. S.*, 92 F. 2d 305; *Simmons v. U. S.*, 18 F. 2d 85; *Reeve v. Howe*, 33 F. 2d 619; *U. S. v. Reynolds*, 111 F. 2d 589; *U. S. v. Office Number 508 Ricond-Brewster Building*, 119 F. 2d 24; *Nathanson v. U. S.* 290 U. S. 41; *U. S. v. Hall*, 114 Fed. Sup. 441; and *U. S. v. Kennedy*, 5 F. R. D. 310.

Finally, analogous authority may be found in the decisions interpreting Rule 3 of the Federal Rules of Criminal Procedure which Rule provides: "A complaint • • • shall be made upon oath before a Commissioner or other officer empowered to permit persons charged with offenses against the United States." It is generally held that such a complaint by a United States Attorney not based on personal knowledge (*U. S. v. Baumert*, 179 Fed. 735, and *U. S. v. Langsdale*, 115 F. Sup. 489) or merely reciting that the allegations are based on "official investigation" (*U. S. v. McCunn*, 40 F. 2d 295) is insufficient to support the issuance of a warrant under the above Rule.

II.

THE EVIDENCE FAILS TO ESTABLISH THE CHARGE THAT PETITIONER'S NATURALIZATION WAS ILLEGALLY OR FRAUDULENTLY OBTAINED

We assume here, solely for purposes of our argument, that so much of the finding below as holds (App. 27a) that Petitioner was a member of the Communist Party from 1935 to "at least through 1937 and 1938" is supported by this record.

At least three primary elements must converge before a claim of fraud is established. There must have been (1) a misrepresentation (or concealment) of (2) a material fact with (3) knowledge of its falsity. Thus, if the finding of fraud is to be sustained here, it must appear from the record by "clear, convincing and unequivocal" evidence that:

1. Communist Party membership was material on the issue of Petitioner's naturalization;
2. Petitioner misrepresented (or concealed) his alleged Communist Party membership by giving a negative answer to Question 28; and
3. Petitioner must have known that his negative answer to Question No. 28 was false.

(1) Communist Party Membership Was Immaterial to Naturalization under the 1906 Act.

The 1906 Act, as originally enacted, (34 Stat. 597) required the petitioner to state that he was not "a disbeliever in or opposed to *organized government*, or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized *government* * * *" (53 Stat. 843-844). Subsequent amend-

ments to the 1906 Act, prior to 1940, did not affect this requirement, and this was the belief requirement for naturalization at the time of Petitioner's naturalization in 1938.

The statutory form of Declaration of Intention set forth in the 1906 Act required Petitioner to affirm "I am not an anarchist." And the form of the Petition required that he state:

> "I am not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in organized government."

As we have seen (*supra*, p. 3-4), the Nationality Act of 1940 (54 Stat. 1137; 8 U. S. C. 907) made the first substantial changes in the belief requirements for naturalization. Section 305 of that Act, in addition to disqualifying those who were "opposed to organized government", provided for the disqualification of those who believe in or were members of organizations which advocate "the overthrow by force and violence of the government of the United States."[6]

Thus, a comparison of the language of the 1906 Act and the subsequent 1940 Act makes it apparent that the belief qualifications applicable under the 1906 Act at the time of Petitioner's naturalization in 1938, were addressed at anarchists and included neither Communists by name nor believers in "the overthrow of existing government in the United States."

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[6] This Court, however, has held that this change in the belief requirements under the 1940 Act did not exclude Communist Party members, *per se*, from naturalization. See *Schneiderman v. United States*, 320 U. S. 118, note 8 on page 132 and note 53 at page 159.

The Internal Security Act of 1950 was the first Congressional enactment barring "Communists" as such from citizenship. 64 Stat. 1015.

This conclusion is confirmed by the legislative history of attempts to amend the 1906 Act so as to bar Communists or advocates of "overthrow by force and violence of the Government of the United States." (See *Schneiderman*, note 8, page 132. See also Report No. 1923 accompanying H. R. 7120, 74th Congress, 1st Session, May 27, 1935; and remarks of Mr. Rees of Kansas for the House Committee on Immigration, 86 Cong. Rec. 11942; 11949.)

It is significant, too, that while Congress did amend the deportation laws in 1918 so as to exclude not only aliens who are "opposed to organized government" but also those who teach and advocate "the overthrow by force and violence of the Government of the United States or of all forms of law" (41 Stat. 1008), no such provision was enacted with respect to naturalization.

The obvious conclusion is that Congress was aware of the distinction between these concepts[7] and did not regard Communist Party membership, nor advocacy of overthrow of the government, as material to naturalization in 1938 when Petitioner was naturalized.

The record here, in two instances, establishes affirmatively that the Immigration Service *in 1938* did not regard such membership as material.

First, as we have noted above, each of the Immigration Examiners testified to suspicions that Petitioner was a Communist; they regarded him as a labor agitator associated with sit-down strikes; they were "primed" for

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[7] For a judicial recognition of the distinction between advocacy of anarchy and advocacy of communism, see the dissent by J. Pound, concurred in by J. Cardozo in *People v. Gitlow*, 234 N. Y. 132. The question was not considered on the later Supreme Court review in *Gitlow v. New York*, 268 U. S. 652. See also *Encylopedia Brittanica*, 12th ed. 1926, Vol. 1, pp. 692; "* * * Communism in its form is closely allied to syndicalism but not to anarchism as is often falsely maintained."

him (App. 26a). They did not, however, think Communist membership material to naturalization; otherwise they would have asked him to confirm or deny such membership. Instead, as their notations on his Petition show, they inquired into his labor activities and beliefs—perhaps because at that time (1938) the idea was currently held that all labor "organizers" were "radicals."

Second, the identical charge now made against Petitioner—falsely swearing in connection with his naturalization—was pressed by the Government to a criminal indictment of Petitioner in 1941 for perjury. Presumably the Government made a thorough investigation. Nevertheless, this indictment was never brought to trial and ultimately was dismissed on motion made by the Attorney General of the United States. The Immigration Service, then under the Attorney General must have known or had reason to believe for some ten years prior to the bringing of this denaturalization proceeding, that evidence was available from which it might be concluded that Petitioner at the time of his naturalization was a member of the Communist Party. The failure of the Service to act upon this information for ten years is potent proof that it did not regard Petitioner's alleged Communist Party membership, nor the character of that membership, nor the character of that organization at the time, as material on the issue of Petitioner's naturalization.

It follows that the first requirement for a finding of fraud is not established here.

(2) There Was No Concealment nor Misrepresentation by Petitioner.

In addition to materiality, the fact upon which a charge of fraud is predicated must have been wilfully misrepresented or intentionally concealed.

The Court below, after expressly finding that Petitioner was not specifically asked concerning alleged Communist Party membership (App. page 26a), concluded, nevertheless, that Question No. 28 contained in his Preliminary Form of Petition should have been interpreted by Petitioner as an inquiry concerning Communist Party membership and should have evoked from Petitioner an admission of such membership (App. 32a-33a). This requires a consideration of the meaning a reasonable man would be expected to give to Question No. 28 in 1938.

Question No. 28 is in two parts, each of which Petitioner answered in the negative. The first inquiry: "Are you a believer in anarchy?" refers to the applicant's individual political beliefs. Since, as we have seen, a belief in Communism or a belief in overthrow of the government in this country, is not to be equated with a belief in anarchy, this first inquiry of Question No. 28—"Are you a believer in anarchy?"—was obviously answered truthfully by Petitioner—even if it be assumed that he was a Communist. Hence, there was no misrepresentation or concealment as to this first inquiry of Question No. 28.

We come then to the second inquiry of Question No. 28: "Do you belong to or are you associated with any organization which teaches or advocates anarchy *or the overthrow of existing government in this country?*" (Emphasis ours.)

In attempting to ascertain the meaning of this inquiry, we must be mindful that a finding of fraud like all other findings in a denaturalization proceeding, must be based upon "clear, unequivocal and convincing evidence"; and "that the facts and the law should be construed as far as is reasonably possible in favor of the citizen" (*Schneiderman* at p. 160).

This second inquiry, unlike the first, refers to membership and not to one's personal political beliefs. Thus, it refers to membership in either of two (2) *different* kinds of political organizations: the first relates to membership in an anarchist organization; the second, membership in an organization "advocating overthrow of existing government in this country."[8]

As to the first, Petitioner's negative answer was clearly a truthful answer—even if, as we have assumed, he was a Communist Party member. For, as we have seen and as the Trial Court held, the Communist Party was not an organization teaching anarchy.

Now, what of the second aspect of this inquiry—do you belong to an organization teaching "overthrow of the existing Government in this country?"[9]

Would a reasonable man in 1938—and assuming he was a Communist Party member—equate membership in the Communist Party with membership in an organiztaion "teaching overthrow of existing Government in this country"?

The short answer, of course, is that a majority of the members of this Court, after examining the same documents and the same character of oral testimony relied upon by the Government here, held that such an equation was not established. *Schneiderman v. United States, supra.*

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[8] This conclusion follows unless we accept the view that "overthrow of existing government in this country" and "anarchy" are used interchangeably in Question No. 28; and that the former was meant to be only a freehanded translation of the statutory proscription of the latter. But if this is so, then, clearly, Petitioner's negative answer was a truthful answer.

[9] We discuss later (*infra*, pp. 46-49) the constitutional implications of such an inquiry. Suffice it now to point out that the 1906 Act did not in terms authorize such an inquiry (*supra*, pp. 3-4).

There are, however, additional reasons for a negative answer here.

It must have been common knowledge to every Communist Party member in 1938, that a member of the national committee of their Party (Schneiderman) had been admitted to citizenship—and this under the same 1906 Act and same questionnaire as that involved here; and, further, that his qualification for citizenship had not been challenged.[19] A Communist Party member in 1938 must also have known that, notwithstanding repeated efforts, Congress had consistently refused to make advocacy of even *violent* overthrow, a proscription against naturalization.

A 1938 Communist in Detroit must have known, too, that the current of publicity in his community had for years associated "sit-down" strikes with Communists. From this he might well have concluded that, if Question No. 28 on his Petition for Citizenship was, indeed, meant as an inquiry concerning Communist Party membership, it would be more specific or, in any event, he would be specifically asked about such membership at the oral examination. The record here is that he was not and the Trial Court so held.

Nor was Petitioner, as an assumed 1938 Communist, obligated, against his own personal judgment, to so characterize the organization. He was entitled to make his own independent evaluation of the organization's teachings and advocacy as he reasonably understood them—not as the government's witnesses would characterize them sixteen years later. Hindsight is always clearer than foresight. It is one thing to determine now, and against the background of a current reappraisal of past events, that the

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[19] The Complaint in *Schneiderman* was filed June 30, 1939 (119 F. (2d) 500, 501).

Communist Party advocates overthrow of our Government. But it is still another thing to hold that an alien, in the pre-1938 period and without knowledge of these subsequent events, should have made the same appraisal. And this is particularly true where, as here, we are dealing with a period in which the Communist Party was an accepted political party in both State and National elections.[11]

Thus, the situation confronting Petitioner in 1938, as a reasonable man, with respect to this last portion of Question 28, is analogous to that dealt with by the Court of Appeals for the Third Circuit in *United States v. Kessler*, 213 F. (2d) 53 (1954). The Government there charged that the defendant's citizenship should be cancelled because she answered "No" to the question "Have you ever been arrested or charged with the violation of any law of the United States or of any city ordinance or traffic regulation".

The Government's proofs showed that defendant had been arrested for "obstructing highway" and discharged seventeen times. Defendant's contention was that each of these "arrests" was illegal since there was no such offense. The appellate court held that the defendant's "asserted interpretation of the scope of the question was a reasonable one for she had been informed by [the magistrate] seventeen times, and by counsel for her union on numerous occasions, that she had committed no crime cognizable at law."[12]

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[11] We have included here, as an appendix to this Petition a summary of the *New York Times Index* showing news items concerning the Communist Party in the pre-1938 period.

[12] It is pertinent here to observe that a Government inquiry such as Question No. 28, is so vague, indefinite and unclear in its meaning, that it may not serve to predicate a claim of illegal conduct. See the recent opinion of the Court of Appeals for the District of Columbia in *O'Connor v. United States*, unreported, 25 Law Week 2273, Dec. 20, 1956.

(3) The Showing as to Petitioner's Knowledge of the Advocacy of the Communist Party.

In determining whether the Petitioner wilfully misrepresented the fact of his alleged Communist Party membership, the question of his own knowledge and understanding of the teaching and advocacy of the Party, as disclosed by the evidence, must be considered. Cf. *Weiman v. Updegraff*, 344 U. S. 183. The determining factor is not the interpretation which the Government's witnesses placed upon the Party's program, nor the books attributed to the Party; but, rather, what the evidence shows concerning the Petitioner's knowledge and beliefs with respect to the organiization's teaching and advocacy.

The witnesses may have viewed the organization in one light, depending upon their organizational activity; Petitioner, as something altogether different. What an organization stands for, what it advocates and teaches is normally to be gathered from its constitution, resolutions and the official statements of its officers. These, as *Schneiderman* indicates, may be altogether different from the understanding of one of its members or the characterization ascribed to them by disgruntled former members some sixteen years later.

The testimony of the witness Zygmont, though ignored by the Trial Court as evidence in support of the Government's contentions, nevertheless, graphically illustrates the point we make here and supports our contention.

In 1937, Zygmont left the Communist Party and joined a "Trotskyite" organization (which was an opposition organization to the Communist Party) (Trial Tr. 883), because he believed the Communist Party to be a "phony revolutionary" party (Trial Tr. 885). In 1938, he wrote a pamphlet in which he condemned the program, aims and

objectives of the Communist Party and urged the members of that organization to join the "Trotskyite" party.

The following is the witness' own language with respect to the reasons for the writing of this pamphlet:

> "Q. (By Mr. Goodman, continuing): I will show you Defendant's Exhibit 6 and ask you whether you can identify that as a pamphlet that you wrote?
>
> A. Yeah.
>
> Q. And when did you write that pamphlet?
>
> A. 1938.
>
> Q. Was that written just after you had left the Communist Party?
>
> A. Yes.
>
> Q. And in that pamphlet, did you attempt to explain the reasons why you were breaking with the Communist Party?
>
> A. Yes" (Trial Tr. 891).

The following quotes from the pamphlet show Zygmont's understanding, *at that time*, of the aims and objectives of the Communist Party during the period up to 1938:

> "Stalinists desire to create People's Fronts on the model of the Mayflower, which in the year 1776 had for its purpose to struggle against England and to create capitalism in America."
>
> "This move at that time was progressive, but today, American capitalism is reactionary and imperialistic. However, the Communist Party desires to maintain it and stabilize it" (Trial Tr. 898).
>
> * * * * *
>
> "Communists have proven by deeds that they are struggling to maintain capitalism" (Trial Tr. 912).

Finally, at the end of his pamphlet, the witness told the readers of the virtues of the "Trotskyite" party as con-

stituting a truly revolutionary party (as distinguished from the Communist Party) which he urged the readers to join:

> "In order to abolish capitalism and introduce the Socialist order of society, the working class must aim to take over into its own hands the State power. Securing the State power by the Proletariat cannot follow the path of taking over the bourgeoisie State machinery through the medium of attaining a majority of the Parliament. The bourgeoisie will always utilize all manner of force and terror to defend and protect its property and its political supremacy. The Capitalists, like the feudal nobility, will not surrender to the new, rising class without bitter struggle.
>
> "Therefore, the force of the bourgeoisie can only be broken by the working class by immediate removal of the existing State apparatus. That is, the Capitalist Army, Police, Bureaucratic Hierarchy, Parliament and replace such by the organization of the Proletariat State" (Trial Tr. 935).

This single conflict in the opinion evidence with respect to this crucial issue in the Government's case should suffice to show that the proof here does not begin to meet the requirements of the *Schneiderman* decision of "clear, unequivocal and convincing evidence". If a man like Zygmont, who was so active and had been an official and an organizer for the Communist Party up to 1937, could then conclude that the Communist Party advocated cooperation with capital to effect a peaceful transition to socialism, as opposed to violent overthrow of the government, how can a finding of denaturalization in this case based on a contrary conclusion be said to be predicated on clear, convincing and unequivocal evidence?

However, it is not necessary that we argue nor is there any necessity for a determination here of what the teaching and advocacy of the Party actually was in 1938. What is important is Petitioner's knowledge and understanding of the program and advocacy of the Party.

The witness Eager, after considerable prodding, was able to recall that at one of the "thirty" closed Party meetings (Trial Tr. 311) he allegedly attended with Petitioner prior to 1938, he heard Petitioner say:

> "* * * And he said we couldn't depend entirely on ballots in this country; it was only by a militant Communist leadership in the shops, stores and factories and mines that we could expect to have a Soviet America" (Trial Tr. 315-316).

Later this same witness confessed (Trial Tr. 323):

> "A. I have heard him speak at several meettings. You can't keep it all in your mind. It is so long ago, I can't remember him passing any particular remarks that would leave any indelible mark on my memory."

But after more prompting by the Government, the witness recalled hearing Petitioner say prior to 1938 (Trial Tr. 324):

> "* * * that it was only by an aggressive Communist Party leadership in the unions that we could get the mass of the workers in back of that leadership, and whenever the revolution would come for a Soviet America that then we would have the people, the workers, at our back.
>
> Q. Did he ever discuss with you the role the unions would play in this revolution? (Tr. 324).
>
> * * * * *
>
> A. I can't say if I did" (Tr. 326).

And after still more prodding by Government counsel, this witness stated (Tr. 331):

> "A. I can't recall his exact words or expressions by anybody at meetings, it is so long ago, that is, the exact words of what was said. But it was on about the same order as what he said—he stated at Magnolia Hall, which was only by a militant leadership of the Party members in the stores, factories, and shops that we could ever hope to have a Soviet America. I think that was the general substance of his remarks.
>
> Q. (By Mr. Hamborsky): And that is all that you can recall he said during the time that you were a member of the Ternstedt Unit with Mr. Nowak?
>
> A. Well, that is about all I can actually recall that I can testify in court."

Notwithstanding the witness Eager had testified ten years previously before a grand jury and a legislative committee about Petitioner, this was the first and only time he had ever given the above testimony about alleged utterances of the Petitioner (Trial Tr. 371).

On re-direct Examination this witness was asked if he could recall "anything further" Petitioner had said at any meeting (Trial Tr. 378). He finally accommodated Government Counsel as follows (Trial Tr. 379):

> "A. The only thing I can recall him saying one night, at a meeting, that was slightly differen , I guess, and yet the same question of militancy and all that, and there was political action, the question was brought up at the meeting and he told us at that time that we couldn't depend too much on the ballot to gain our objectives *but that it would eventually resolve to bullets*, and it was only by the same militancy of the workers in the plants that we, as leaders, would be able to establish a Soviet America." (Emphasis ours.)

This belated reference to "bullets" should be compared with the above-quoted testimony (*supra*, p. 37) of Eager on direct examination regarding this same alleged speech.

The witness Nowell, employed by the Service as a "consultant" and used by the Government as a professional witness, was able to recall a meeting "around September of 1935" at which the Petitioner is alleged to have "recapitulated his—what he terms or stated was his ideology and political growth and maturity" (Trial Tr. 456-7):

> "He went on to make a brief analysis of capitalism and the conditions under which the Communist Party operated, that is, the theories under which it operated, and stated his full agreement with those theories and the leadership of the Communist Party of the United States and the Communist International, its program and final objectives—and I quote as nearly as possible—he stated that the working class could never achieve its objectives or get its rights under capitalism, that it would be necessary to destroy—I am reasonably sure of the word 'destroy'—capitalism and set up a government of the workers."

And, notwithstanding according to Nowell's own testimony, (*supra*, pp. 12-13) this was the meeting at which Petitioner was "inducted" into the Party!

The witness Fountain testified that Petitioner attended a Communist Party convention in "either 1937 or 1938" (Tr. 660). After considerable leading by Government counsel, this witness, too, was able to recall the following statement allegedly made by Petitioner at this Convention (Trial Tr. 664-5):

> "A. Well, just to go into more detail on what was said in that class in which Mr. Nowak was one of the lecturers, the goal of all this activity was to

extend the Soviet system around the face of the earth, and it was said that the primary work was to get to them through working people, through labor. Through working class organizations and Unions, and that the duty of the Communist Party was to get its members inside these unions wherever that was possible, and to attempt to control them and to direct them, and to win their loyalty over to the Russian system."

* * * * *

"A. The only way that I can answer it is to say that in substance, in the course of this lecture, he said that when you are a Communist, you try to win control of your union for the Communist Party; you agitate an election; you work by trying to win elections and get people elected to office, Communists and otherwise, and that this is to be carried on year in and year out, seeking control for the Communist Party.

You can't get it that way then it may be necessary to use violence to get it, to win control, or the Communist Party and the Communist system. That was his goal." (Emphasis supplied.)

The foregoing testimony represents the evidence offered by the Government to support its claim as to Petitioner's knowledge of the nature and advocacy of the Communist Party. It is upon this evidence that Petitioner's citizenship is cancelled. Where is there here any advocacy by Petitioner of overthrow of the Government of the United States? Or any evidence that he knew the Communist Party as such? The most that can be said is that these utterances indicate opposition to the capitalist system (which is not the Government of the United States), and a desire to see that system eventually replaced by the institution of a workers' government such as was believed to exist under the "Soviet" system. (Cf. *United States v.*

Rovin, (E. D. Mich.) 12 F. (2d) 942, quoted with approval in *Schneiderman*, p. 138.)

Moreover, even if the term "Soviet system" is assumed to refer to the system of government rather than the economic system in the Soviet Union, is it not permissible under the amendment provisions of our Federal Constitution to substitute that system of government for our present system of government? And, if this be true, is it not also permissible under the First Amendment to advocate such substitution? Attachment to the principles of our Constitution—which the Court below says the above reference to "Soviet system" negates—does not necessitate a belief that the Constitution is static and cannot be changed at any time. And certainly attachment to the Constitution presupposes attachment to its First Amendment which, as we argue herein later (*infra*, p. 46-49) protects even advocacy of *violent* overthrow in the absence of a showing of "incitement" or a "clear and probable danger."

One final point remains to be considered on this issue of the Petitioner's knowledge and understanding of Communist Party advocacy in 1938. While the Trial Court recognized (App. 29a) that membership alone in an organization is insufficient to predicate a finding of knowledge of alleged illegal teaching and advocacy of that organization (*Schneiderman*, at p. 154-155), both the Trial Court and the Court of Appeals endeavor to overcome this by calling attention to findings concerning the Communist Party made upon *other* records and involving other times.[13] Thus, the Trial Court (App. 30a-31a) concludes (App. 32a):

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[13] The Court of Appeals refers only to post-1945 decisions.

> "Therefore, since at the time defendant petitioner for naturalization the Communist Party had been held to be and was an organization advocating the overthrow of this government by force and violence (citing decisions of lower courts) a fact well known to defendant, we conclude that defendant by answering question No. 28 in the negative intentionally concealed his membership in the Communist Party in the United States."

This inference by the Trial Court as to Petitioner's knowledge in 1938 of these prior lower court decisions, ignores the fact, made clear by this Court in *Schneiderman* (p. 147) that:

> "On varying records *in deportation* proceedings some courts have held that administrative findings that the Party did so advocate was not so wanting in evidential support as to amount to a denial of due process, others have held to the contrary on different records, * * *. This Court has never passed upon the question whether the Party does so advocate * * *."

It cannot be assumed, as the Trial Court and Court of Appeals did, that merely because, upon the trial records in the cases they cite, the courts there characterized the Communist Party in one manner, all other courts were bound to arrive at the same conclusion regardless of the trial record before them. Nor is there any foundation for the Trial Court's assumption that Petitioner was aware of these decisions by lower Federal Courts.

In affirming the Trial Court, the Court of Appeals appears to have placed prime reliance upon its prior holdings in the *Sweet, Chomiak* and *Charnowola* cases, 211 F. (2d) 118 (1954); cert. den. 348 U. S. 817. But naturalization in each of those cases occurred in the post-1945 period and was pursuant to the 1940 Nationality Act. That Act

(*supra*, pp. 4-5), unlike the 1906 Act, expressly forbade naturalization of anyone who, within the prior ten-year period, had been a member or affiliate of an organization teaching or advocating the *violent* overthrow of Government.

In the light of these considerations it cannot be said that the record here—even if all the Government's testimony is credited—establishes clearly, convincingly and unequivocally that Petitioner in 1938 knew or had reason to know the Communist Party as an organization which taught and advocated the "overthrow of existing government in this country."

And it follows from this that the third requirement for a finding of fraud is lacking here.[14]

III.

THE NATURALIZATION COURT'S FINDING OF GOOD MORAL CHARACTER AND ATTACHMENT CANNOT BE RE-EXAMINED IN THE ABSENCE OF FRAUD

The Trial Court's finding of illegal procurment is predicated upon its conclusion that Petitioner lacked attachment and good moral character at the time of his naturalization. And this conclusion is in turn based upon the finding of undisclosed Communist Party membership.

What we have said above in connection with the finding of fraud applies with equal vigor to the finding of illegal-

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[14] The Government also charged that Petitioner's negative answer to Question No. 23 ("Do you fully believe in the form of Government of the United States?") was false and that Petitioner's oath was false. But the Trial Court made no finding as to either of these. In any event, however, what we have said above applies with equal validity to these contentions.

ity. For it was the finding of fraud which served as the basis for the finding of lack of attachment and good moral character.

There is, however, an added reason why the finding of illegality cannot be supported upon this record.

Since the judgment of naturalization is itself a finding of attachment and good moral character based upon testimony of competent witnesses, any conclusion that Petitioner lacked good moral character and attachment in 1938 necessarily assumes that the Court below possessed the power at any time to re-examine the factual issues and findings made by the Naturalization Court. In this case re-examination occurs sixteen years after the time of Petitioner's naturalization. The question thus is presented whether or not the denaturalization statute by its terms or by necessary construction confers such judicial power.

The answer depends upon a proper interpretation of the 1906 Act's statutory requirements of "good moral character" and "attachment." Does the statute mean that each petitioner must possess these attributes as an objective fact on which all courts and all judges at all times must agree? Or does the statute mean that each petitioner, at the time of his naturalization, must show to the satisfaction of the Naturalization Court, and that court must *find as a fact*, that the petitioner possesses these attributes? We contend that the statute must necessarily mean the latter; otherwise the judicial findings underlying naturalization are never settled but vary according to the particular judge and the particular times in which their re-examination is sought.

The question of whether findings of attachment and good moral character could be set aside years later, while noted in the majority opinion in *Schneiderman, supra,* at

pp. 123-125, was not reached by the Court. The Court there held that, in any event, the evidence failed to establish the charge of lack of attachment or good moral character; and this, notwithstanding the Petitioner there admitted long-time membership and high officership in the Communist Party; was familiar with most of the documents offered by the Government; and had failed to disclose this information on his naturalization examination (*Schneiderman v. United States*, 320 U. S. at pp. 126-128; 119 F. (2d) 500, at p. 502.)

But this question was the subject of Mr. Justice Douglas' concurring opinion in *Schneiderman, supra*, p. 161. He was of the view that the statute made the naturalization court's finding (as to the petitioner's attachment and good moral character) the "condition precedent" to naturalization; and not the actual possession by petitioner of these subjective attributes. Therefore, he concluded (pp. 162-163):

> "It is my view that Congress by that provision made the finding the condition precedent, not the weight of evidence. Such a finding can of course be set aside * * * on grounds of fraud."[15]

The interpretation thus set forth by Justice Douglas has become the accepted view of this Court. In the later case, *Knauer v. United States*, 328 U. S. 654, where Mr. Justice Douglas spoke for this Court, the issue was fraud in the taking of the naturalization oath. The defendant

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[15] The change of wording contained in the denaturalization section of the 1952 Act appears to confirm this view. The elimination in this Act of the ground of illegal procurement is generally accepted as evidencing a Congressional intent that attachment and good moral character not be re-examined in the absence of "concealment of a material fact or wilful misrepresentation." See *66 Har. L. R. 643, 719* and *51 Mich. L. R. 881, 892.*

argued that the question of the validity of his oath was not open to re-examination. The rationale upon which this Court decided this issue adversely to the defendant, supports the above view expressed by Mr. Douglas in *Schneiderman*. For in *Knauer* this Court said (p. 670):

> "We need not consider the extent to which a decree of naturalization may constitute a final determination of issues of fact, *the establishment of which Congress has made conditions precedent to naturalization*. Those facts relate to the past—to behavior and conduct. But the oath is in a different category. It relates to a state of mind and is a promise of future conduct. It is the final act by which an alien acquires the status of citizen. It requires forswearing of allegiance in good faith and with no mental reservations. The oath being the final step, no evidence is heard at that time. It comes after the matters in issue have been resolved in favor of the applicant for citizenship. Hence, no opportunity exists for the examiner or the judge to determine if what the new citizen swore was true, was in fact false. Hence, the issue of fraud in the oath cannot become *res judicata* in the decree sought to be set aside. For fraud in the oath was not in issue in the proceedings and neither was adjudicated nor could have been adjudicated." (Emphasis supplied.)

We emphasize the words "the establishment of which" because of their particular significance; they indicate that in the opinion of this Court in *Knauer* it was the objective fact of attachment and good moral character, *established by judicial finding*, which constituted the condition precedent to naturalization; and not the subjective fact of whether or not the petitioner actually possessed attachment or good moral character.

Moreover, such an interpretation of the statute is required to avoid both abrogation of the judicial doctrine of *res adjudicata* in naturalization cases as well as the question of constitutional separation of powers referred to by Mr. Justice Rutledge in his concurrence in *Schneiderman*. For since, as we have demonstrated above, there was no fraud committed by Petitioner, it follows that the determination of attachment and good moral character, necessarily made by the Naturalization Court, is *res adjudicata* or protected by the principle of collateral estoppel (*Commissioner v. Sunnen*, 333 U. S. 591, 596-598; *So. Pac. Co. v. U. S.*, 168 U. S. 1, 48-49; *Sealfon v. United States*, 332 U. S. 575; *U. S. v. Oppenheimer*, 242 U. S. 85); unless a different rule is to be applied by this Court in denaturalization cases.

IV.

THE ORDER OF DENATURALIZATION VIOLATES THE FIRST AND FIFTH AMENDMENTS

As we have seen, the 1906 Act, as amended, was in force at the time of Petitioner's naturalization in 1938. The Trial Court held that the validity of Petitioner's naturalization had to be determined by that Act. But the 1906 Act speaks in terms of "anarchy" and nowhere is there any mention of advocacy of "the overthrow of existing government in this country." This Act also specified what should be contained in petitions for naturalization filed pursuant to its provisions; and did not include the question of "overthrow of existing government in this country." (See 34 Stat. 497.)

The introduction of this concept of "overthrow" is an innovation made by the Immigration Service. Its validity does not appear to have been passed on by this Court.

It is clear, however, that if Congress itself could not have made such a requirement a precondition for citizenship, then the Immigration Service, as an agency of Congress, lacked authority to do so.

We have seen that, although frequently requested to do so, Congress refused to enact such a proscription prior to the Nationality Act of 1940; and this, notwithstanding it had passed a similar provision with respect to persons seeking entry into this country. This failure to legislate is potent proof that Cngress did not intend such a proscription to be grafted upon the 1906 Act by administrative fiat.

But aside from the question of Congressional intention, there is the more fundamental question of Congressional power, under the limitations of the First Amendment and the Fifth Amendment,[16] to exclude from citizenship members of organizations which teach and advocate "overthrow of existing government in this country."

This Court held that a State may not proscribe advocacy of overthrow of government so long as such overthrow is to be by peaceful means. To do so is to violate the "due process clause of the Fourteenth Amendment." *Stromberg v. California*, 283 U. S. 359. If due process thus prohibits such prohibition by a State, the same due process under the Fifth Amendment prohibits such action by Congress.

Again, since we deal here in the realm of speech, beliefs and associations, this Court also has said that advocacy of overthrow—even violent overthrow—is protected by the First Amendment in the absence of a showing that such

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[16] It is settled that resident aliens are within the protection of these Amendments. *Bridges v. California*, 314 U. S. 190.

advocacy was by words of incitement to action (*Near v. Minnesota*, 283 U. S. 697, 716; *DeJonge v. Oregon*, 299 U. S. 355, 363-6; *Herndon v. Mallory*, 301 U. S. 242, 261), and *Dennis v. United States*, 341 U. S. 494.

And, finally, this Court has said that Congress lacks the power to circumscribe speech or other conduct within the purview of the First Amendment, unless it is shown that such speech or conduct offers a clear and present (or probable) danger of substantive evil. *Dennis v. United States*, 341 U. S. 494; *Terminello v. City of Chicago*, 337 U. S. 1, 4; *American Communications Assn. v. Douds*, 339 U. S. 382.

Surely, therefore, if Congress could not validly enact such a proscription without including either expressly or by necessary implication the above limitations, the Immigration Service lacked authority to do so under any power delegated to it by Congress.

The judgment below necessarily implies an interpretation of the Act of 1906 to include a proscription against advocacy, or against membership in an organization engaged in advocacy, of overthrow of the government. But any such interpretation, to be constitutionally valid, must also read into that Act (and into Question No. 28) the further limitations that such advocacy be advocacy of *violent* overthrow; that it be by language *inciting* to action; and that it be under circumstances presenting a clear and present danger of substantive evil. These are the minimal limitations which this Court found to be constitutionally requisite to sustain the constitutionality of the similar proscription in the Smith Act. *Dennis v. United States*,

supra.[17] See also *Bridges v. California*, 314 U. S. 252 and the concurring opinion by Mr. Justice Rutledge in *Musser v. Utah*, 333 U. S. at p. 98.

Thus, even if the 1906 Act be interpreted as authorizing Question No. 28, the judgment of cancellation here is unconstitutional since there is no evidence and no finding of "incitement to action" and the proofs fail to support a claim that any advocacy by this Petitioner or by the Communist Party in the pre-1938 period offered a "clear and present danger of a substantive evil."

CONCLUSION

The Writ of Certiorari should issue and the judgment below should be reversed.

Respectfully submitted,

GOODMAN, CROCKETT, EDEN & ROBB,

By: ERNEST GOODMAN, GEO. W. CROCKETT, JR.,
Counsel for Petitioner.

Detroit, Michigan,
January —, 1957.

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[17] In *Dennis* the jury was instructed and found that the teaching and advocacy of the Communist Party in the indictment period (post-1945) was "by language reasonably and ordinarily calculated to incite persons to action" (9 F. D. R. 367, 391). This finding was deemed by this Court an "essential" element of the offense. 341 U. S. 494, 512. There is no comparable finding here with respect to the pre-1938 period.

APPENDIX

An examination of the *New York Times Index* for the period 1934 to 1938 reveals the following selected news items concerning the Communist Party:

1934

Apr. 3—Party Convention at Cleveland.
Apr. 29—Party's Election Slate in New York.

1935

Mar. 25—Debate between John Strachey and E. D. Martin on Communism as Solution to Depression.
Apr. —Party's election slate in New York.

1936

Mar. 5-
10—Nationwide Broadcast over Columbia Broadcasting System by Earl Browder for Communist Party; criticism of Columbia Broadcasting System for allowing the same and reply of broadcasting system; comments by Congressmen.
June 15—Party's Convention and Proposed Candidates for Federal offices.
Dec. 21—Party's Presidential Campaign Expenses in California.

1937

Aug. 25—Party to publish daily newspapers in Chicago and San Francisco.

Sept. 14—Celebration of 18th Anniversary of the Party.
Oct. 18—Browder pledges Party support to Roosevelt.
Nov. 14—Party's celebration of 20th Anniversary of USSR.
Dec. 10—Party wins legal action to obtain use of Philadelphia Municipal Convention Hall.

1938

Jan. 20—Party mass meeting in Madison Square Garden, New York City.
Feb. 5—Party's membership announced at 60,000.
Feb. 19—Twenty-two thousand new members reported by Party.
Feb. 22—*Earl Browder, Party's National Secretary, denies that Party seeks violent overthrow of United States Government;* publication of Party resolutions.
May 15—Draft of Party's National Constitution.
May 22-24—New York State Party Convention; report on finances and enrollment; officers elected; approval of Party's National Constitution requiring members to be citizens and to pledge themselves to peace and democracy.
May 27-31—Party's National Convention.
June 1-21—Party's New National Constitution and election platform.
June 30—Browder testifies on tenets of Party.
Sept. 5—Browder asks support for Roosevelt.
Nov. 6—Communist Party has 15 Candidates for House of Representatives.

The following public information concerning the Communist Party in Michigan for the years 1932-38 is taken from the *Michigan Official Directory and Legislative Manual* for 1941-2, issued by the Michigan Secretary of State:

1932—William Z. Foster, Communist Party Candidate for President of the United States received 9,318 votes in Michigan (p 460).

1936—Earl Browder, Communist Party candidate for President received 3,384 votes in Michigan (p. 461).

(The *Manual* lists the Communist Party's candidates and the vote received by each for all major National and State offices in Michigan.)

Nos. 12765; 12768

UNITED STATES COURT OF APPEALS
for the Sixth Circuit

Stanislaw Nowak, *Appellant*, v. United States of America, *Appellee*.	Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.
Rebecca Maisenberg, *Appellant*, v. United States of America, *Appellee*.	

Decided November 26, 1956.

OPINION

Before Simons, Chief Judge; Martin and Miller, Circuit Judges.

Per Curiam. These two denaturalization proceedings were tried separately in the district court and heard separately on appeal from orders entered by United States District Judge Picard of the Eastern District of Michigan, revoking orders granting citizenship to appellants and canceling certificates of naturalization issued to them respectively on June 13, 1938, and on January 24, 1938.

Upon consideration of the briefs, the oral arguments and the records in these two cases, we find that all the points

of law made and argued by appellants—except the question of whether the affidavit of good cause in each of the cases was sufficient to confer jurisdiction upon the district court—have been adjudicated adversely to the contentions of appellants in the opinion of this court, affirming judgments of denaturalization entered, respectively, by United States District Judges Levin, Thornton, and Picard, of the Eastern District of Michigan, in *Sweet v. United States, Chomiak v. United States,* and *Charnowola v. United States,* 211 F. (2d) 118 (C. A. 6), decided February 19, 1954. Our opinion in those cases cited relevant Supreme Court opinions: *Knauer v. United States,* 328 U. S. 654; *United States v. Ginsberg,* 243 U. S. 472, 475; *Schneiderman v. United States,* 320 U. S. 118; *Dennis v. United States,* 341 U. S. 494, 498; *Blau v. United States,* 340 U. S. 159, 161; and also the opinion of Chief Judge Simons of this court in *Albertson v. Millard* [E. D. Mich., 1952], 106 F. Supp. 635, 642, 643, 644.

The findings of fact of the district judge in each of the cases now under review were supported by substantial evidence and certainly were not clearly erroneous; and the conclusions of law in both cases were based upon logically correct reasoning and supported by highest authority.

Appellants argue that the required affidavits of good cause were insufficient to confer jurisdiction upon the district court. When boiled down, the argument is that the affidavit of good cause filed in each of these cases was based on hearsay and was not evidentiary in character. It is contended that the opinion of the Supreme Court in *United States v. Zucca,* 351 U. S. 91, holds that an affidavit showing good cause is a procedural prerequisite to maintenance of denaturalization proceedings, that the government attorney must file an affidavit showing good cause, and that

"the affidavit must set forth evidentiary matters showing good cause for cancellation of citizenship."

In our judgment, the affidavit of an attorney of the Immigration and Naturalization Service of the United States Department of Justice reciting facts appearing in the official records, such as the affidavit filed in each of these cases, was an adequate compliance with the statutory requirements as interpreted in the *Zucca* case. The affidavit thus set forth sufficient evidentiary matters to show good cause for cancellation of the citizenship of each appellant. Fairly construed, the affidavit states facts appearing in the official records of the Immigration and Naturalization Service. It would be too stringent a requirement to hold that the good cause affidavit need embrace testimony of prospective witnesses. The affidavits in issue gave fair and sufficient notice of the facts charged as a basis for cancellation of citizenship of the appellants as to apprise them properly of the facts and reasons upon which their citizenship was sought to be revoked. Appellants were thus sufficiently apprised of the charges as to be prepared to meet the proof thereof, if they had been able to do so.

Upon the entire record, we are of opinion that the United States proved the allegations upon which the certificates of naturalization were canceled, by clear, unequivocal and convincing evidence.

The order or judgment of the district court in each case is affirmed.

Judge Miller concurs in the result.